In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-150

EDDIE LOUIS JOHNSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the trial court erred in allowing the government to cross-examine his character witness as to an arrest of petitioner that occurred subsequent to petitioner's arrest for the offense for which he was on trial.

Petitioner was convicted in the United States District Court for the Northern District of Ohio on two counts of selling heroin, in violation of 21 U.S.C. 841(a). He was sentenced to concurrent terms of six years' imprisonment on each count. The court of appeals affirmed (Pet. App.).

The principal evidence against petitioner consisted of the testimony of an informant, Ted Clark, who testified that he had purchased quantities of heroin from petitioner on two separate occasions in 1972 (Tr. 20-24, 26-30).[1] Both transactions were made by the informant in cooperation with federal narcotics agents. Although the agents did not observe the actual transfer of heroin on either occasion, Clark was thoroughly searched before and after his contacts with petitioner (Tr. 20, 24, 30, 165, 174, 178, 209) and the place where the transactions occurred was kept under surveillance (Tr. 110-112, 124-128, 166-167).

Petitioner took the stand in his own defense, denying that he had sold heroin to Clark or that he had been present at the scene of either transaction (Tr. 345-348, 361-363).

Petitioner called Mrs. Vivian Price as a character witness. On direct examination Mrs. Price testified as to petitioner's present good reputation in the community, both for veracity and as a law-abiding citizen.[2] On cross-examination the witness was asked if she had "ever heard

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[1] "Tr." refers to the reporter's transcript of the trial.

[2] Q. Will you tell us what is his reputation for truthfulness in the community?

A. Well, everyone seems to like Eddie, and when they speak of him, they speak of him as being a well-mannered young man. And that's the way I feel about him, too.

Q. Do you have the means of knowing his reputation for being a law-abiding citizen?

A. Yes.

Q. Will you tell the Court and the jury *what that reputation is*? [Emphasis added; Tr. 378-379]

that [petitioner] was arrested for selling heroin by the Cleveland Police Narcotics Division in May of 1973?" (Tr. 385). Petitioner objected. During the bench conference that followed, it was established that petitioner was arrested in May of 1973 for selling heroin (Tr. 385-389). The objection was overruled. Following a cautionary instruction to the jury,[3] the prosecutor reiterated the following question (Tr. 390-391):

> Now, Mrs. Price, have you heard that in May of 1973, [petitioner] was arrested for selling heroin by the Cleveland Police Department at Shantell's Superette?

Subsequent character witnesses confined their testimony to petitioner's reputation for veracity (Tr. 400-401, 481-484, 486-489).

In his instructions to the jury, the trial judge once again explained the limited purpose for which evidence of petitioner's offense could be considered (Tr. 544-545).

Petitioner contends that the trial court erred in allowing the government to cross-examine his character witness concerning an arrest that occurred subsequent to his arrest for the offense for which he was being tried. Specifically, petitioner contends that the court contravened the procedures prescribed in *Michelson* v. *United States,* 335 U.S. 469, by failing to conduct an *in camera* inspection of his arrest record and by allowing the cross-examination to include evidence of his present reputation as a law-abiding citizen. He also contends that the circuits are in conflict in applying *Michelson.*

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[3]"However, members of the jury, this line of questioning and the responses has limited evidentiary value. You shall not consider this testimony as it bears on the guilt or innocence of the accused, but it is admitted solely for the purpose of testing this witness's knowledge of the defendant's reputation for being a law-abiding citizen, and any inquiry at this with respect to the extent of her knowledge or lack thereof of the opinion previously expressed as to truthfulness and law-abiding nature of the defendant are admitted solely as it bears on the weight and credibility of this witness's recollection and knowledge of the defendant's reputation for these character traits" (Tr. 390).

1. Petitioner's contention that an *in camera* inspection must be held prior to the government's cross-examination concerning a previous arrest misconstrues *Michelson*, which simply requires that the court "ascertain, out of presence of the jury, that the target of the question was an actual event, which would probably result in some comment among acquaintances if not injury to defendant's reputation" (335 U.S. at 481). Here, the trial court complied with this prescription. Immediately following the initial question, a bench conference was held at which it was ascertained that the arrest had in fact occurred. Moreover, the court prefaced the reiterated question with a cautionary instruction explaining the limited purpose for which the question was allowed; it again included a similar instruction in its final charge to the jury.

2. Petitioner's contention that the trial court erred in allowing the jury to consider evidence of his reputation in the community subsequent to the offense for which he was tried is unwarranted in light of the content of the direct examination, during which the character witness was allowed to testify as to petitioner's reputation as a law-abiding citizen at the time of the trial. The court thereupon exercised its discretion soundly in allowing the cross-examination to "take in as much ground as the testimony it is designed to verify." *Michelson, supra,* 335 U.S. at 484. Had the government been restricted to a narrower scope of cross-examination, petitioner would have improperly profited by a "mere parade of partisans" (*id.* at 479). See *United States* v. *Null,* 415 F. 2d 1178, 1179-1180 (C.A. 4).

3. Contrary to petitioner's contention, there is no conflict among the circuits in applying *Michelson*. In *United States* v. *Lewis*, 482 F. 2d 632, 643 (C.A. D.C.), the trial court erred in issuing an advisory ruling which permitted cross-examination of character witnesses as to the defendant's arrest subsequent to the offense for which he was standing trial because its ruling was made before it knew which aspects of the defendant's reputation the witnesses intended to testify about, or whether the reputation would be attested as of the date of the offense or some later time. In the present case, however, the court knew precisely what ground had been traversed on direct examination before defining the permissible scope of cross-examination.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

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